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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1406

CITY OF LOS ANGELES, a municipal corporation,

Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., *et. al.*

Respondents.

Petitioners' Brief in Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California.

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Petitioners' Brief in Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California.

The purpose of this brief is to reply to new issues raised in Respondents' Opposition Brief (Rule 22.5).

I.

Respondents Ignore the Controlling Law Found in Burbank.

Respondents have chosen to argue their position in a vacuum. They fail to even consider the controlling law enunciated in *City of Burbank v. Lockheed Air Terminal, Inc.*[1] Apparently, they have forgotten the two most important points enunciated in *Burbank*:

[1]411 U.S. 624, 36 L.Ed.2d 547, 93 S.Ct. 1854 (1973).

"That act [The Noise Control Act of 1972] reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, *preempting state and local control.*" 411 U.S. at 638. (emphasis added).

"[C]ontrol of noise is of course deep seated in the police powers of the states. . . . The pervasive control vested in the EPA and in the FAA under the 1972 Act seems to us to leave no room for local curfews *or other local controls.*" *Id.* at 638. (emphasis added).

Any attempt to impose state nuisance liability upon an airport proprietor must, because of these two principles, fail.

II.

The "Savings Clause" of the Federal Aviation Act of 1958 (49 U.S.C. §1506) Has Not Been and Cannot Be Interpreted in a Manner Which Would Permit Respondents' Nuisance Action.

Recently, this Court reaffirmed in *Jones v. Rath Packing Co.*, 97 S.Ct. 1305 (1977), that where Congress has " 'unmistakably . . . ordained' " that its enactments are to be the sole regulation of an area of commerce, state laws regulating that aspect of commerce are unconstitutional and impermissible. *Id.* at 1309. While this result may be compelled by an express Congressional command explicitly stated in the language of the statute, *Jones* recognizes that the Congressional command of preemption may also be "implicitly contained in [the statute's] structure and purpose." *Id.* (Citing to *Burbank*). Under these circumstances, the issue then becomes whether or not the state's " 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.*

After an extensive review of the legislative history of the relevant statutes this Court concluded in *Burbank* that Congress had preempted the field of airport noise control. 411 U.S. at 633. The Congressional goals and objectives identified in that process included the need for a centralized federal authority to maintain the "delicate balance" between airspace safety and efficiency, protection of persons on the ground, as well as the control of noise pollution. *Id.* at 638-639. The Court reaffirmed that local governmental entities cannot regulate in this area so long as the Congress requires federally directed uniformity. Quoting part of the legislative history of relevant amendments to the Federal Aviation Act, the Court noted:

> " 'The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves *controlling the flight of aircraft*. . . . HR 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. *State* and local governments will remain unable to use their police powers to control aircraft noise by.' " 411 U.S. at 635 (emphasis added).

Respondents seek to escape the inevitable conclusion that the recovery of nuisance damages under State law is tantamount to local regulation of aircraft in flight. In doing so, they rely upon the "savings clause" of the Federal Aviation Act of 1958 (49 U.S.C. §1506).

One commentator, analyzing savings clause arguments on federal preemption questions, has characterized them as "makeweight arguments" and has suggested that "neither the presence nor the absence of a savings or exclusiveness provision is alone sufficient to resolve a pre-emption question." Note, *Pre-emption as a Preferential Ground: A New Canon of Construction,* 12 Stan.L.Rev. 208, 214-215

(1959). Savings clauses are always interpreted in the context of the more specific provisions of the regulated legislation.

In *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), this Court held that the Congressional purpose underlying the Interstate Commerce Act was to eliminate discrimination by creating uniform shipping rates regulated by the Interstate Commerce Commission. 204 U.S. at 439. Given that purpose, the Court held that a savings clause in the Act, *identical to that present in the Federal Aviation Act*, would not permit a private damage action attacking the reasonableness of rates which were subject to the jurisdiction of the federal agency (204 U.S. at 446-447) because, the Court concluded, "the act cannot be held to destroy itself." *Id.* at 446.

The courts have applied the reasoning of *Abilene* to other private damage actions relying upon the presence of a savings clause. In *Danna v. Air France*, 334 F.Supp. 52 (S.D.N.Y. 1971), aff'd, 463 F.2d 407 (2d Cir. 1972), members of a purported class alleged that numerous airlines maintained a "Youth Fare" ticket pricing structure which discriminated against persons older than twenty-five years in violation of Section 404(b) of the Federal Aviation Act (49 U.S.C. §1374(b)). The court held that the issue of discriminatory rates was not a proper subject for judicial inquiry and dismissed the action under the doctrine of primary jurisdiction (of the Civil Aeronautics Board).[2] Ex-

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[2]Respondents suggest that a similar case, *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) authorized "common law actions affecting aviation though subject to exclusive federal (CAB) regulation." Respondents' Brief at 8. *Nader* was basically a primary jurisdiction case. Its holding regarding the savings clause was premised upon the fact that the CAB had not, to that point, regulated in the area of airline "overbooking" (426 U.S. at 297 n.8), and that the particular language of Section 411 of the Act did not carry with it the "power to immunize". 426 U.S. at 301. Under those circumstances, the Court determined that

amining the very "savings clause" (49 U.S.C. §1506) upon which respondents rely, the court concluded:

> "It is not likely that the Congress would legislate a scheme under Federal agency aegis, aiming at uniformity, and at the same time permit the survival of State common law rights inconsistent therewith. That was the holding in Texas & Pac. Ry. v. Abilene Cotton Oil Co., *supra* where it was determined that a shipper could not sue a railroad carrier for an allegedly unreasonable charge based on filed tariffs, because the common law right was extinguished, as absolutely inconsistent with the scheme of the Interstate Commerce Act. It should be noted that the 'saving' provision in the ICA as it then stood was virtually *in haec verba* the language later adopted by the Congress in the 'saving clause' of the Federal Aviation Act of 1958. *It is clear, therefore, that the Act of 1958 had engrafted on to it, at least presumptively, the gloss of Abilene with which the Congress was familiar.*" 334 F.Supp. at 59 (emphasis added).

See also *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 474 (1959) (this Court will not assume that the Congress was unaware of *Abilene, supra*, in drafting a similar "savings clause").

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a private damage action for overbooking would not require the trial court to "substitute its judgment" for that of the CAB. 426 U.S. at 299-300.

Nader is, therefore, readily distinguishable from the circumstances here since: (1) the FAA has adopted extensive regulations regarding aircraft in flight—including regulations adopted for noise abatement purposes; and therefore, (2) respondents' nuisance counts would require the trial court in this case to "substitute its judgment" for that of FAA regarding the regulation of aircraft in flight for noise abatement purposes.

Further, this Court, the District Court[3] and the Ninth Circuit Court of Appeals all agreed in *Burbank* that there had been a Congressional intent, as in *Abilene*, to impose a *uniform* scheme of federal regulation. Each court also concluded that the savings clause of the Federal Aviation Act could not be interpreted in a way which would frustrate the otherwise expressly stated Congressional objectives and goals in the Federal Aviation Act and related airport noise legislation. In its opinion in *Lockheed Air Terminal, Inc. v. City of Burbank*, 457 F.2d 667 (9th Cir. 1972), the United States Court of Appeals for the Ninth Circuit stated:

> "The State also points out that the Federal Aviation Act contains a 'saving clause,' 49 U.S.C. §1506, a reservation of common law and statutory remedies, indicating that Congress did not intend to preempt state and local regulatory authority.
>
> 'Of course such a general provision does not resolve specific problems, *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, 671, n.22 [83 S.Ct. 984, 991, 10 L.Ed.2d 52], but its inclusion in the statute plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable.' *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 444, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963) (concurring opinion).
>
> "In this case, we have found the conclusion of federal preemption 'unavoidable.' Furthermore, the Federal Aviation Act also contains language of exclusivity. 49 U.S.C. §1508 declares that the United States possesses and exercises 'complete and exclusive national sovereignty in the airspace of the United States.

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[3](*Lockheed Air Terminal, Inc. v. City of Burbank*, 318 F.Supp. 914 (C.D. Cal. 1970)).

> . . .' That is the same type of expression which the Supreme Court found in the Federal Tobacco Inspection Act to evidence Congressional intent to establish a wholly federal system which States were powerless even to supplement. Campbell v. Hussey, 368 U.S. 207, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961)." 457 F.2d at 675.

In this Court's opinion in *Burbank*, it was the exclusivity language of 49 U.S.C. §1508 which was found to be of paramount importance. 411 U.S. at 626-627.

The true thrust of respondents' argument in this regard is summarized at page 8 of their Brief where they state: "Thus, assuming *arguendo* that Congress had an intent that local *regulation* be 'pre-empted', private *actions for damages* are permitted for any adverse consequences of the regulated activity." (Petitioner's emphasis). The inherent sophistry of this argument was recognized long ago in the often quoted opinion by Judge Dooling in *American Airlines, Inc. v. Town of Hempstead*, 272 F.Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017. In that case, Judge Dooling noted:

> "Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic [citations omitted]." 272 F.Supp. at 235.

Regulation of the "consequence" is regulation of the cause. If individual state courts are permitted to place the intricate system of federal regulation of aviation under local control by adjudicating the "reasonableness" of aircraft

flight operations, and then to place their policy determinations into effect through the award of money damages, the Congressional objective of a uniform and exclusive system of federal control of aircraft for noise abatement purposes will not only be frustrated, it will be defeated. The savings clause of the Federal Aviation Act cannot be applied in a way which would preclude accomplishment of the Congressional objective of a uniform federal solution to the national airport noise problem.

III.

Respondents Misstate and Misrepresent the Holding of the Seventh Circuit in Luedtke v. County of Milwaukee.

Respondents state, (Respondents' Brief at 8, footnote 1), that the U.S. District Court, in *Luedtke*[4] dismissed the action against the airport operator on the ground that the state court was the appropriate forum for trying *all* claims. Such a statement is inaccurate in that respondents neglect to mention that the District Court was referring only to the inverse condemnation portion of the suit, not to the nuisance claim. The United States Court of Appeal addressed this precise issue in affirming the District Court's decision:

> "The District Court held that *even if it were to consider* these allegations, . . . the plaintiffs action on these counts could not be maintained. We agree.
>
> "Since the federal laws and regulations have preempted local control of aircraft flights, *Burbank, supra*, the *Defendants may not, to the extent they comply with such federal laws and regulations, be charged*

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[4]371 F.Supp. 1040 (E.D. Wis. 1974), aff'd. 521 F.2d 387 (7th Cir. 1975).

with negligence or creating a nuisance." 521 F.2d at 391. (Emphasis added.)

Respectfully submitted,

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